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No. 91-418

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC. and COMMODORE AVIATION, INC.,

Petitioners,

vs.

JESUS E. CALDERON, as Personal Representative of the ESTATE OF ELVIA MERCEDES CALDERON, Deceased, and on behalf of JESUS E. CALDERON, CARLOS ARTURO CALDERON, CLAUDIA ELENA CALDERON and LUIS ALFONSO CALDERON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit correctly refused to review the district court's order of remand pursuant to 28 U.S.C. § 1447(d)?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent would agree with petitioners' Statement of the Case except in the following regard:

Petitioners' characterization of the district court's order of remand is inaccurate. The district court reached a single decision to remand the case to the state court based upon its finding that the petitioners had pled no federal cause of action.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied for at least three reasons. First, the United States Court of Appeals for the Eleventh Circuit correctly refused to review the district court's decision remanding this case to the state court. Secondly, even though the issue of the exclusivity of the Warsaw Convention is an important one, appeal of a remand order is not a proper avenue of review, especially when there is pending before this Court a petition for a writ of certiorari in a case where review would be appropriate. Thirdly, the Circuit Court of Appeals' decisions consistently apply this Court's opinions in *Thermatron Products Inc. v. Hermansdorfer,* 423 U.S. 336 (1976) and *Waco v. United States Fidelity and Guaranty Co.,* 293 U.S. 140 (1934), as well as the provisions of 28 U.S.C. § 1447(d).

I.

THE ORDER OF REMAND WAS NOT REVIEWABLE UNDER THE COURT'S DECISION IN *WACO v. UNITED STATES FIDELITY AND GUARANTY CO.* OR OTHERWISE.

Petitioners seek review of the Eleventh Circuit's dismissal of the petitioners' appeal of the district court's order remanding this case to the state court. Such an appeal is specifically prohibited

by 28 U.S.C. § 1447(d) which in pertinent part provides as follows:

> An order remanding a case to the State court from which it was removed was not reviewable on appeal or otherwise . . . .

As such, the Eleventh Circuit's dismissal of petitioners' appeal was entirely proper.

Petitioners seek to avoid § 1447(d)'s straightforward prohibition on appeal by characterizing the district court's order as one falling within a narrow exception to the statute's prohibition. In doing so, petitioners rely upon this Court's decision in *Waco v. United States Fidelity and Guaranty Co.*, 293 U.S. 140 (1934). However, this Court's decision in *Waco* offers no support for petitioners' argument. In *Waco*, this Court established a narrow exception to the ban on review. In that case, the district court dismissed a third-party action which had been the sole basis for federal jurisdiction. As a result of that dismissal, the district court determined that it was without federal jurisdiction and remanded the case to the state court. This court in reviewing the Fifth Circuit's dismissal of an appeal from that order stated as follows:

> True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the district court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

This exception to the ban on review is patently not applicable to the order in this case. There was no order preceding the order of remand which dismissed any federal claim or party. Neither

does the remand order effect any substantive right of the petitioners. Petitioners are free to raise the Warsaw Convention as a defense in the state court action.

Petitioners cite numerous Circuit Court of Appeals cases which have followed the *Waco* decision and have recognized a right to appeal. While respondent would agree that these cases correctly interpret the *Waco* exception to the ban on review, respondent would disagree that they are at all applicable to the case herein. Some of the cases are almost identical to the *Waco* situation, that is, the district court dismisses the party upon whom federal jurisdiction is based and then remands the case. *See, e.g., Mitchell v. Carlson,* 896 F.2d 128 (5th Cir. 1990); *Alien v. Ferguson,* 791 F.2d 611 (7th Cir. 1986); *Koreza v. Spirito,* 723 F.2d 1003 (1st Cir. 1983); *Armstrong v. Alabama Power Company,* 667 F.2d 1385 (11th Cir. 1982); *Katsaris v. United States,* 684 F.2d 758 (11th Cir. 1982); and *Southeast Mortgage Company v. Mullins,* 514 F.2d 747 (5th Cir. 1975). As in *Waco,* the order of dismissal was reviewable in these cases.

The other cases involve situations where the district court made a substantive decision, completely separate and distinguishable from any jurisdictional decision, which dictated remand of the case. The most prevalent of such decisions involves the interpretetion of "forum-selection clauses." In fact, the other cases cited by the petitioners are either forum-selection or forum-waiver cases. *See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273 (9th Cir. 1984); *Foster v. Chesapeake Insurance Company,* 933 F.2d 1207 (3d Cir. 1991); *Regis Associates v. Rank Hotels (Management) Ltd.,* 894 F.2d 193 (6th Cir. 1984); *Karl Koch Erecting Co. v. N.Y. Convention Center Dev. Corp.,* 838 F.2d 656 (2d Cir. 1988); *Clorox v. United States District Court for the Northern District of California,* 779 F.2d 517 (9th Cir. 1985).

The "forum-selection clause" exception to § 1447(d)'s ban on review was first recognized by the Ninth Circuit in *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984). In that case, Pelleport brought a contract claim against Budco in the state court. Budco subsequently removed the case to the federal district court where Pelleport filed a motion for remand arguing that a forum-selection clause in the contract required the case to be in the state court. The district court determined that the forum-selection clause was valid and enforceable and remanded the case.

On appeal, the Ninth Circuit held "the district court's contract interpretation is appealable" because "it reached a substantive decision on the merits apart from any jurisdictional decision". *Pelleport*, 741 F.2d 276-277. In addition, the court found the order interpreting the contract was reviewable, because it was conclusive on the question, and to refuse the appeal deprived Budco of a right to appeal a substantive determination of contract law.

The Ninth Circuit capsulized its *Pelleport* decision in the case of *Clorox v. United States District Court for the Northern District of California*, 779 F.2d 517 (9th Cir. 1985), stating:

> When a district court's remand order is based on a resolution of the merits of soms matter of substantive law "apart from any jurisdictional decision", § 1447(d) does not foreclose appellate review of that decision.

Clorox, 779 F.2d at 520.

Clearly the *Pelleport* line of decisions has no applicability to the instant case. This fact is demonstrated by the opinions in *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989), and *Glasser v. Amalgamated Workers' Union Local 88*, 806 F.2d

1539 (11th Cir. 1986), as well as *Survival Systems Division of the Whitaker Corporation v. United States District Court of the Southern District of California*, 825 F.2d 1416 (9th Cir. 1987), and *Whitman v. Raley's Inc.*, 886 F.2d 117 (9th Cir. 1989).[1] In *Glasser*, the plaintiff brought a state court claim against the union alleging that he had been wrongfully denied certain medical benefits under an employee-benefit plan. The union removed the case to the district court claiming that the Employee Retirement Income Security Act (ERISA) preempted all of the plaintiff's state claims. The district court found that the plaintiff's only pled state law claims and that appellant's federal claims were merely defenses. Applying the well-pled complaint rule, the district court concluded that it lacked jurisdiction and remanded the case to the state court.

On appeal, the union sought to argue that the court should adopt the "matter of substantive-law" exception created by the Ninth Circuit in *Clorox* and *Pelleport*. However, as the Eleventh Circuit court noted, the exception is a narrow one.

> [I]t permits appellate review of a district court remand order only where that order is based solely on a matter of substantive law. It expressly does not permit review of a remand order based on a lack of jurisdiction. *Clorox*, 779 F.2d at 520. *Pelleport*, 741 F.2d at 276-77. Therefore, we will not consider whether we will adopt this exception because, even if we did, the remand order in the

---

1. Petitioners argue that the court's decisions in *Glasser* and *Hansen* are not applicable because the district court's remands therein were based upon their finding that the federal law which the defendants invoked to support removal did not apply to the factual allegations in the complaint. In *Glasser*, this is clearly not the case. As for *Hansen*, although the district court found that federal law did not apply, the reasoning of ths Ninth Circuit is still very instructive.

> instant case would not be appealable. The district court expressly based its decision to remand on the conclusion that it lacked subject matter jurisdiction.
>
> It is true, as in *Clorox* and *Pelleport,* the decision underlying the remand order involved a conclusion of substantive law. However, unlike in those cases, *here the substantive-law decision related to the question of jurisdiction; the remand order did not affect the substantive rights of the parties. Compare Clorox,* 779 F.2d at 520; *Pelleport,* 741 F.2d at 276-77. In particular, the court did not reach the merits of the preemption argument. The state court may, in fact, rule that ERISA does preempt appellee's state-law claims and that appellees must proceed as appellants contend, under § 1132(a)(1)(B) of ERISA.

(Emphasis added.) *Glasser,* 806 F.2d at 1540.

In *Hansen,* Mrs. Hansen brought a claim in the state court against Blue Cross for failure to pay insurance benefits. Blue Cross removed the action based solely on the existence of a federal question contending that Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, (ERISA) preempted the state-law claims. The district court determined that under the allegations of the complaint, Hansen's claims were not ERISA claims because she had paid her own premiums. Accordingly, the district court remanded the case. In this regard, petitioner is correct that the decision to remand was based upon the court's determination that the federal law did not apply to the plaintiff's claim. However, this fact offers no support to petitioners and was rejected by the Ninth Circuit. On appeal, before the Ninth Circuit, Blue Cross argued that because the district court made a factual determination

that Hansen paid her own premiums and then concluded that her policy was not covered by ERISA that the order was reviewable. The Ninth Circuit disagreed stating that the district court had not decided a disputed issue of fact, but merely looked to the allegations of Hansen's complaint. Secondly, the Ninth Circuit found *Pelleport* did not apply because:

> Blue Cross fails to demonstrate how the district court's legal decision was *apart* from the question of subject-matter jurisdiction as required to fall within the exception to non-reviewability establishsd by *Thermatron* and its progeny . . . . In deciding whether subject-matter jurisdiction exists, a district court will reach legal conclusions concerning the presence of diversity or a federal question. Blue Cross merely disagrees with the legal conclusion that the district court drew . . . . Assuming, without holding, that such a decision is erroneous, section 1447(d) precludes review of remand ordsrs based on lack of subject-matter jurisdiction even when the decision is wrong.

Hansen, 891 F.2d at 1388.

Blue Cross also argued that it could appeal the district court's finding that Hansen's complaint was not an artfully pled state-law claim. However, as the Ninth Circuit noted:

> A district court's decision that a complaint is not artfully pled is a jurisdictional decision related to the application of the well-pleaded complaint rule.

Hansen, 891 F.2d at 1389.

Similarly, in the case of *Survival Systems Division of the*

Whitaker Corporation v. United States District Court of the Southern District of California, 825 F.2d 1416 (9th Cir. 1987), the plaintiff brought a state-court action asserting various wrongful discharge claims and claims for intentional and negligent infliction of emotional distress against her employer. The employer removed the case to the federal court based on preemption under federal labor law. The court found that all but one of the employee's claims was preempted by the National Labor Relations Act and thus dismissed them. However, it found that her claim for intentional infliction of emotional distress was not preempted. Based upon this finding, the district court remanded the emotional distress claim to the state court. The employer appealed relying upon the Ninth Circuit's previous decisions in *Pelleport* and *Clorox.* The Ninth Circuit denied review stating as follows:

> In this case, the order of remand did not resolve a matter of substantive law, as in *Pelleport* or *Clorox.* The ruling of the district court was that the state cause of action alleged in Rodriquez' complaint was not an artfully pled federal claim that was preempted by federal labor law. This did not finally resolve the issue of preemption, which could still be raised as a defense to the state claim in the state court. Thus, if the proof in state court were such as to justify the conclusion that the cause of action was completely preempted by federal labor law, the defense of preemption could be sustained. The ruling of the district court was simply that the allegations of the complaint did not justify such a result.
>
> Thus, the only issue decided by the remand ordsr is the jurisdictional issue that the claim of intentional infliction of emotional distress was a state claim and not an artfully pled federal claim.

> The district judge then exercised her discretion in remanding that state claim. Therefore, the remand is not reviewable on appeal as a substantive decision under the doctrine of *Pelleport* and *Clorox*.

Survival Systems, 825 F.2d at 1418.

Finally, in two companion cases out of the Ninth Circuit, *Whitman v. Raley's Inc.*, 886 F.2d 117 (9th Cir. 1989) and *Krentz v. Connecticut General Life Insurance Company*,[2] 886 F.2d 117 (9th Cir. 1989), the court posed the following issue and response:

> Does 28 U.S.C. § 1447(d) bar review of remand orders that are based on a finding that federal law does not completely preempt plaintiff's state claims? We hold that it does.

In reaching this decision, the court applied the following reasoning:

> A distinction must be drawn between the inquiry the district court faces in considering whether a case was properly removed and the inquiry as to whether a preemption defense exists. At the removal stage, the inquiry is solely whether congress intended a preemptive force so powerful as to displace entirely any state cause of action within the ambit of the federal cause of action . . . .

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2. In *Whitman*, the issue raised was whether § 301 of the Labor Management Relations Act completely preempted plaintiff's state claims. And in *Krentz*, the issue was whether or not ERISA completely preempted plaintiff's state claims.

This jurisdictional issue of whether "complete preemption" exists is very different from the substantive inquiry of whether a "preemptien defense" may be established. The jurisdictional question concerning "complete preemption" centers on whether it was the intent of Congress to make the cause of action a federal cause of action and removable despite the fact that the plaintiff's complaint identifies only state claims. The latter inquiry, concerning a "preemption defense", is a substantive inquiry as to whether a legal defense exists. This would be a matter for trial by a court having jurisdiction. The possible existence of a "preemption defense" does not justify removal . . . .

On a remand petition where the removal petition is based on complete preemption, the sole issue before the district court is whether the plaintiff's claim is one of those claims that is "completely preempted" by federal law. If the court rules that the claim is not "completely preempted", the federal court lacks jurisdiction to rule on the substantive preemption defense.

A remand based on lack of "complete preemption" is a remand required by 28 U.S.C. § 1447(c) . . . . When a case is remanded on the ground that the federal court is without jurisdiction pursuant to § 1447(c), the remand order "is not reviewable on appeal or otherwise". 28 U.S.C. § 1447(d); *Thermatron Products Inc. v.*

Hermansdorfer, 423 U.S. 336 (1976).[3]

As one can see, neither *Waco* or its progeny in any way support review of the order of remand entered by the district court in this case. Petitioners have failed to demonstrate that the district court's legal decision regarding the Warsaw Convention was apart from the question of subject-matter jurisdiction. The ruling of the district court was that the state cause of action alleged in respondent's complaint was not an artfully pled federal claim that was preempted by federal law. The only issue decided by the remand order was the jurisdictional issue that plaintiff's claim was a state claim and that the federal court thus lacked jurisdiction to hear the matter. This did not finally resolvs the issue of whether or not the Warsaw Convention applies to the case because this can still be raised as a defense to the state claim in the state court. The remand in this case was based on the lack of "complete preemption", and thus was a remand required by 28 U.S.C. § 1447(c). When a case is remanded on the ground that the federal court is without jurisdiction pursuant to § 1447(c), remand order is not reviewable on appeal or otherwise. *Thermatron Products Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). As such, the Eleventh Circuit properly dismissed petitioners' appeal. This Court should likewise deny petitioners' petition for a writ of certiorari.

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3. The reasoning in *Whitman/Krentz* was followed by the Fifth Circuit in *Soley v. First Nat'l Bank of Commerce,* 923 F.2d 406 (5th Cir. 1991).

II.

ALTHOUGH THE EXCLUSIVITY OF THE WARSAW CONVENTION IS AN IMPORTANT ISSUE, REVIEW OF AN ORDER OF REMAND IS NOT THE PROPER AVENUE TO ADDRESS THE ISSUE.

Respondent would agree that the issue of whether the Warsaw Convention provides plaintiff's exclusive cause of action is an important issue. However, respondent strongly disagrees that this petition for writ of certiorari is the appropriate avenue for this Court to address that issue. It is noted by petitioner that this Court has on several occasions addressed the Warsaw Convention but always as the result of a proper avenue of review. Moreover, the plaintiffs in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991) have petitioned this Court for review of the Second Circuit ruling on the exclusivity issue. As such, this Court does have an appropriate avenue to review the issue of the Warsaw Convention's exclusivity should it wish to do so.

III.

THE CIRCUIT COURTS OF APPEALS' DECISIONS REGARDING REVIEW OF REMAND ORDERS ARE CONSISTENT.

Petitioners' assertion that the Circuit Courts of Appeals differ widely in their determination of the reviewability of remand orders is erroneous. As demonstrated earlier, the Circuit Courts of Appeals have been able to properly apply the criteria set forth by this Court in *Thermatron Products Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and *Waco v. United States Fidelity and Guaranty Co.*, 293 U.S. 140 (1934).

Where the district courts entered an order dismissing a federal party or claim prior to the order of remand, the Circuit Courts of Appeals have appropriately allowed review of the order of dismissal. The courts have also allowed review of substantive orders which precede the order of remand and which decide substantive issues completely separate from jurisdiction which are binding upon the parties.

The Circuit Courts of Appeals have also consistently refused to review orders of remand in situations where the order of remand is based upon a substantive decision which is intrinsically intertwined with a jurisdictional issue. Such courts have correctly interpreted this Court's decision in *Thermatron* as banning review of remand orders issued under 28 U.S.C. § 1447(c). Where, as here, the decision to remand the case is based upon a district court's finding that it is without jurisdiction to hear the matter, the courts have correctly dismissed appeals of the remands. Petitioner is unable to point to a single case where under such circumstances a Circuit Court of Appeals has granted review. The Circuit Courts' interpretation is not an expansion on the prohibition found at 28 U.S.C. § 1447(d), rather it is merely a proper interpretation of a straightforward legislative enactment prohibiting review. If petitioners are dissatisfied with the ban on review of remand orders, the avenue for relief is through the legislative process not by insupportable judicial interpretation of the statute.

CONCLUSION

In conclusion, the petition for a writ of certiorari should be denied.

Dated: October 14, 1991

Respectfully submitted,

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